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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KRISTIN R.,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS
ANGELES,

Respondent.

LOS ANGELES COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES et al.,

Real Parties in Interest.

B214199

(Super. Ct. No. CK48970)

Writ petition to review orders made at a hearing at which the juvenile court ordered a hearing under Welfare and Institutions Code section 366.26. Sherri Sobel, Juvenile Court Referee. Petition denied.

Law Office of Emma Castro, Ellen L. Bacon and Morgan Spector for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, Frank J. Da Vanzo for Real Party in Interest Los Angeles County Department of Children and Family Services.

Children's Law Center of Los Angeles, Sophia Ali and Diane Coto for Real Party in Interest Z.R.

Law Offices of Timothy Martella, Eliot Lee Grossman and Roxanna Alavi for Real Parties in Interest Estella C. and James C.

Petitioner Kristin R. is the mother of seven-year-old Z.R., a dependent of the juvenile court. In this proceeding, Kristin R. seeks extraordinary relief (Welf. & Inst. Code, § 366.26, subd. (I);¹ Cal. Rules of Court, rule 8.452) from the juvenile court's orders denying her section 388 petition seeking return of Z.R. to her care, restricting her visitation with Z.R., and setting a section 366.26 permanency planning hearing.² We deny the petition.

FACTS AND PROCEDURAL BACKGROUND

On May 17, 2002 the Los Angeles County Department of Children and Family Services (Department) filed a petition under section 300 to declare Kristin R.'s four children, six-year-old L.K., four-year-old P.K., three-year-old M.K. and seven-month-old Z.R., dependents of the juvenile court. The juvenile court ordered the children detained, and at a progress hearing on June 3, 2002 ordered that the children be placed together in one foster home.

On June 26, 2002 Kristin R. submitted the matter on the basis of the Department's reports (see *In re Malinda S.* (1990) 51 Cal.3d 368) and the court sustained an amended petition alleging Kristin R. had placed the children in an endangering situation by leaving them in the care of their father, who suffered from mental and emotional problems, and by allowing a paternal uncle who was a registered sex offender to have access to them. The petition also alleged Kristin R. had used inappropriate physical discipline on the children.

At the disposition hearing on July 12, 2002 the juvenile court ordered the four children placed with a maternal aunt, Gilda L., ordered Kristin R. to complete a parenting education program and participate in individual counseling to address case issues, and

¹ All statutory references are to the Welfare and Institutions Code.

² Although two of the orders challenged by Kristin R. do not constitute "an order . . . that a hearing pursuant to this section be held" (§ 366.26, subd. (I)), they are subject to section 366.26, subdivision (I) and rule 8.452, California Rules of Court. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1024; *In re Tabitha W.* (2006) 143 Cal.App.4th 811, 816.)

continued the matter to January 10, 2003 for the six-month review hearing. (§ 366.21, subd. (e).)

In its report for the six-month review hearing the Department recommended termination of reunification services for Kristin R., indicating she had failed to enroll in parenting education, had not participated in counseling, had been inconsistent in visitation and there was concern she may be using drugs. On February 6, 2003 the juvenile court terminated reunification services and set the matter for a hearing pursuant to section 366.26.

In its report for the section 366.26 hearing the Department indicated Gilda L. had requested legal guardianship as to L.K. but felt unable to continue to care for the other three children. A maternal great aunt, C.G., had expressed interest in legal guardianship of P.K. and M.K., and another maternal great aunt, Estella C., was interested in becoming Z.R.'s legal guardian. Notwithstanding the court's earlier order that the children be placed together, the Department recommended permanent placement of P.K. and M.K. with C.G. in a legal guardianship upon approval of relative assessment, legal guardianship for Gilda L. as to L.K., and long term foster care for Z.R. in the home of Gilda L. until his placement with Estella C. in a legal guardianship could be cleared.

At the section 366.26 hearing on June 5, 2003 the juvenile court found the Department's report to be inappropriate and declined to follow the Department's recommendations. The court ordered the Department to prepare a revised report and continued the hearing to August 5, 2003.

In its revised report the Department recommended termination of parental rights and referral of the children to adoptive planning as a sibling group. The Department indicated there was no identified relative who could adopt all four children.

At the renewed section 366.26 hearing on September 20, 2003 the juvenile court again declined to follow the Department's recommendation, upon its finding of the application of the "sibling relationship" exception to termination of parental rights and

adoption. (§ 366.26, subd. (c)(1)(E)³; *In re Celine R.* (2003) 31 Cal.4th 45, 49.) The court ordered the children placed in legal guardianships with relatives. On October 10, 2003 Estella C. and her husband James C. were appointed legal guardians of Z.R. On October 27, 2004 the court terminated jurisdiction over Z.R.

Five years later, on October 31, 2008, Kristin R. filed a petition under section 388 requesting that Z.R. be returned to her care based upon a change of circumstances. In support of her petition Kristin R. asserted she was no longer using drugs and had stable employment and appropriate housing in the home of her father. Kristin R. further explained that P.K. and M.K. had been successfully returned to her care.⁴ Kristin R. also provided evidence of her completion of substance abuse and parenting programs and negative drug tests. On November 7, 2008 the juvenile court set a hearing on Kristin R.'s section 388 petition for December 5, 2008 as a contested matter and ordered the Department to prepare a report.

In its report for the December 5, 2008 hearing the Department recommended the court dissolve the legal guardianship and order Z.R.'s return to the care of Kristin R. In support of its recommendation the Department indicated the social worker had visited Kristin R.'s house and found it to be neat, clean, orderly, safe and well maintained. P.K. and M.K. were thriving in Kristin R.'s home. Z.R. had stated that he wanted to live with his brothers, but had had little contact with them for several months due to a breakdown in the relationship between Kristin R. and the legal guardians. Kristin R. was in compliance with all of the court's orders, had voluntarily completed a substance abuse program and had routinely tested negative for drugs over a significant period of time. The Department further reported that Z.R. was receiving excellent care in the home of Estella C. and James C. On December 5, 2008 the juvenile court ordered the Department to consider unmonitored weekend overnight visits between Kristin R. and Z.R., granted

³ This provision was relettered 366.26, subd. (c)(1)(B)(v) in 2007.

⁴ The record indicates M.K. was returned to Kristin R. in October of 2007 and P.K. was returned to her eight months later.

Kristin R. a Christmas eve visit and continued the hearing to January 15, 2009. On January 15, 2009 the hearing was again continued to February 4, 2009.

On February 4, 2009 Estella C. and James C. filed a petition under section 388 requesting that the juvenile court terminate Kristin R.'s parental rights and allow them to adopt Z.R. The juvenile court proceeded to conduct the hearing on Kristin R.'s section 388 petition, explaining that it was prepared to set a hearing under 366.26 to consider adoption by Estella C. and James C. in the event Kristin R.'s section 388 petition were to be denied.

Z.R., called by Estella C. and James C., testified that he was having visits with Kristin R. once a week or perhaps every other week. Kristin R. did not call him in between visits. During his visits he watched television and played outside with his brothers while Kristin R. worked on the computer. Sometimes his brothers got into a fight and Kristin R. would send them to a time out, but Z.R. did not fight with his brothers. Grandpa Danny, who also lived in the home, usually cooked and sometimes watched the children while Kristin R. worked on the computer. Z.R. would like to live with his mommy (Kristin R.) and he liked it when she allowed his brothers and him to watch television for a long time. Sometimes Z.R. and Kristin R. played games together, but he did not care very much if he did not get enough time with her. Kristin R. had told Z.R. that he should live with her. The court asked Z.R. to name three good things about living with Estella C. and James C., and Z.R. replied that they give him food he likes, take good care of him and allow him to watch good movies. The court then asked Z.R. to name three good things when he visits Kristin R. and his brothers, and Z.R. replied that they make him laugh, make up good games and pick good movies. Z.R. further testified that he was happy in the guardians' home because they take good care of him.

Kristin R. called Dierdre Evans, the social worker for P.K. and M.K. Evans testified she had worked with the family since February of 2006 and was involved when P.K. and M.K. were returned to Kristin R. Evans further testified she had not observed any problems with the care provided by Kristin R. to P.K. and M.K. and all of the

children interacted appropriately during Z.R.'s visits, although the last visit Evans had observed took place in July of 2008. Evans opined Kristin R. would be able to care for all three children and it would be in Z.R.'s best interest to be returned to the home of Kristin R. and his brothers.

Kristin R., called by the legal guardians, testified Z.R. was detained due to her drug use when he was nine months old and she did not see him until he was five years old because she did not know where he was. Kristin R. contacted the guardians in 2007 to obtain visitation with Z.R. and thereafter visited him as often as the guardians allowed. During visits she took Z.R. and his brothers to various places. Kristin R. was participating in conjoint counseling with P.K. and M.K., but was unaware that the therapist had indicated P.K. and M.K. fight with each other to get her attention. Kristin R. had completed a 12-step program, continued to attend AA meetings and had a "parent partner" for support. Kristin R. was also participating in individual counseling as ordered by the court. Kristin R.'s father was a support person for her, but she would be able to care for all three boys if her father were to leave her home.

Estella C. testified Z.R. was placed with her in September of 2003. She did not initially seek to adopt Z.R. because she thought Kristin R. was going to "come around." Estella C. and her husband had always provided for all of Z.R.'s day-to-day needs. Kristin R. first approached Estella C. to make contact with Z.R. in 2006, but Estella C. did not immediately allow Kristin R. to visit Z.R. because she wanted to be sure Kristin R. was not using drugs. During her initial visits with Z.R., Kristin R. was loving and attempted to interact with him but the dynamics had changed during the past year and Kristin R. had little interaction with any of the three boys during her visits. Z.R. called Estella C. "mom" and Kristin R. "mommie." Z.R. had told Estella C. that Kristin R. did not want him to call Estella C. "mom." Estella C. believed that Kristin R. filed her section 388 petition to have Z.R. returned to her because she resented having to make certain (Kingap) payments for which Kristin R. remained responsible while Z.R. was in the guardians' care. Estella C. did not believe Kristin R. could care for all three boys

because she acted like an older sister to them and not like a mother. Estella C.'s relationship with Kristin R. had become strained during the past several months, and as a result all of Kristin R.'s recent communications had been with James C.

James C. testified that he has a father/son relationship with Z.R.; Z.R. calls him "big dude" and James C. calls Z.R. "little buddy;" and he wants to adopt Z.R.

At the conclusion of testimony Kristin R.'s counsel argued that, although Estella C. and James C. had been providing good care for Z.R., Kristin R. was now fully prepared to care for Z.R., Z.R. wished to live with Kristin R., and under these circumstances it was in Z.R.'s best interest to be returned to Kristin R.'s care and to be reunited with his siblings. Counsel requested that the court grant Kristin R.'s section 388 petition, adding that the parties could work things out to ensure that Estella C. and James C. would continue to have a relationship with Z.R.

Counsel for Z.R. acknowledged Kristin R. had met the change-of-circumstances prong under section 388 and that Z.R. had stated that he wished to live with Kristin R. and his brothers, but argued that it would not be in Z.R.'s best interests to be returned to Kristin R. under the existing circumstances, which included a breakdown in the relationship between Kristin R. and Estella C., who had cared for Z.R. during most of his life. Counsel suggested Z.R. would benefit from increased visitation with Kristin R. with a view to later reunification.

Counsel for the Department acknowledged Estella C. and James C. had been committed to Z.R. from the time they assumed care for him, but submitted the matter on the recommendation in the Department's report that Z.R. be returned to Kristin R.

Counsel for the legal guardians requested that the court maintain the legal guardianship and set the matter for a hearing pursuant to section 366.26 to consider termination of Kristin R.'s parental rights and adoption as sought in the guardians' section 388 petition. Counsel urged the record indicated Kristin R. was not currently prepared to provide proper care for Z.R. and had only recently shown interest in having him returned to her, while the guardians had consistently provided proper and loving care for Z.R.

during almost his entire life. Counsel further requested that Kristin R.'s visitation with Z.R. be restricted to monitored visits,⁵ to prevent Kristin R. from reprimanding Z.R. for calling Estella C. and James C. "mom" and "dad" and from otherwise improperly influencing Z.R.

After hearing argument the court denied Kristin R.'s section 388 petition, finding that although Kristin R. had shown a change of circumstances⁶ it was not in Z.R.'s best interest to return him to Kristin R. The court explained that "parenthood is made of more than genetic material" and, alluding to the Dr. Seuss story *Horton Hatches the Egg*,⁷ told Kristin R., "[Y]ou are not the mother of this child. The mother of this child is [Estella C. Z.R. is] seven years old and has lived almost his entire life in [Estella C.'s] home." The court also found that Kristin R.'s parenting abilities remained limited, as reflected by therapists' reports indicating that P.K. and M.K. "still have significant issues" to deal with, and L.K., who had not been returned to Kristin R., also had "huge" issues that

⁵ When Kristin R. contacted the legal guardians in 2006 to obtain visitation with Z.R., the guardians permitted Kristin R. to visit Z.R. at least once a week at a local park. Estella C. monitored the visits, which came to include participation by P.K. and M.K. After M.K. was reunited with Kristin R. in October of 2007 the guardians began to permit her to have unmonitored overnight visits with Z.R.

⁶ The court stated, "I do believe [Kristin R.] has changed. I honestly do. . . . She has a job, a home. She's clean and sober. . . . [P.K. and M.K.] are taken care of and want to be there."

⁷ In the story, an elephant named Horton is convinced by an irresponsible bird named Mayzie to sit on her egg while she takes a short break, which proves to last for months. The absurd sight of an elephant sitting atop a tree makes quite a scene, and Horton is laughed at by his jungle friends, exposed to the elements, captured by hunters, forced to endure a terrible sea voyage, and finally carted off, tree and all, to be a sideshow in a circus. Horton comes to think of the egg as his, and just as it is about to hatch Mayzie returns and demands that Horton give the egg back. Just then, the egg cracks open and out pops a tiny elephant with wings. Horton's jungle friends unanimously agree the baby is Horton's, reasoning that "it should be, it should be, it SHOULD be like that! Because Horton was faithful! He sat and he sat!" (See also *In re Jerry P.* (2002) 95 Cal.App.4th 793, 813, fn. 64.)

needed to be resolved. Under these circumstances the court found that Kristin R. could not properly care for a third child in her home.

The court further determined that, because Z.R. was “being pulled apart a bit too much,” Kristin R.’s visitation with him should be limited in frequency and restricted to monitored visits. The court proceeded to grant Kristin R. weekly visits of at least four hours with a neutral monitor, to reinstate jurisdiction (§ 366.3, subd. (b)), and to grant the legal guardians’ section 388 petition requesting the setting of a hearing pursuant to section 366.26.

CONTENTIONS

Kristin R. contends the juvenile court abused its discretion by (1) denying her section 388 petition because she demonstrated by a preponderance of the evidence that Z.R.’s return to her would be in his best interests, (2) restricting Kristin R.’s visitation with Z.R. to monitored visits and limiting the frequency of visits to once per week, and (3) setting a hearing pursuant to section 366.26 to consider termination of Kristin R.’s parental rights and adoption by the legal guardians as a permanent plan for Z.R.

Counsel for the Department has submitted a letter advising this court that the Department agrees with Kristin R.’s contention Z.R. should be returned to her care, as reflected in the recommendation in its report to the juvenile court and the social worker’s testimony at the February 4, 2009 hearing. Z.R. has filed a responsive brief submitting that the juvenile court properly denied Kristin R.’s section 388 petition, but agreeing with Kristin R. that the court abused its discretion by limiting Kristin R.’s visitation and joining in Kristin R.’s request that the juvenile court’s order setting a hearing pursuant to section 366.26 be vacated. Estella C. and James C. submit that all of the juvenile court’s orders are proper and should be upheld.

DISCUSSION

1. *Denial of Kristin R. 's Section 388 Petition Was Not an Abuse of Discretion*

At a hearing on a section 388 petition seeking a change of placement, the burden of proof is on the petitioning party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change in placement in the best interests of the child. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526-527, fn. 5.) The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appellate review in the absence of a clear abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 388, 415; *In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

In this case the juvenile court determined Kristin R. did not meet her burden to demonstrate by a preponderance of the evidence that a change of placement was in Z.R.'s best interests. We conclude the juvenile court acted within its discretion in making this determination. Initially we note that, once reunification services are ordered terminated, as here, a parent's interest in the care, custody and companionship of her child is no longer paramount and the focus shifts to the child's need for permanence, stability and continuity. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Accordingly, a court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining whether the change of placement is in the child's best interests. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

The following evidence presented at the hearing on February 9, 2009 supports the juvenile court's decision to deny Kristin R.'s section 388 petition: Z.R. was removed from Kristin R.'s care when he was nine months old and Kristin R. did not see Z.R. again until he was five years old. During most of this period Z.R. lived with the legal guardians, who have provided for all of his day-to-day needs and developed a strong family bond with him. Kristin R. did not call Z.R. in between his visits with her, which took place once a week or every other week. While in Kristin R.'s care, P.K. and M.K. engaged in fights and have issues to be worked out. Although he would like to live with

Kristin R. because he would be with his brothers and be able to watch television for a long time, Z.R. is happy in the home of the legal guardians who have taken good care of him.

We are mindful of Kristin R.'s interest as a natural parent to the care and custody of Z.R. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.) We further recognize Z.R.'s interest in the society and companionship of his siblings (see, e.g., *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 814) and the societal interest in placing a sibling group together in a permanent home. (See *Abraham L. v. Superior Court* (2003) 112 Cal.App.4th 9, 14; § 366.2, subd. (e), 4th par.) Balancing these interests against Z.R.'s interest in permanence and stability, we find no abuse of discretion in the juvenile court's decision that Z.R.'s interest in stability and continuity has come to outweigh Kristin R.'s interest in the custody of Z.R. and the preference for maintaining a sibling group together. The juvenile court thus properly evaluated the evidence and determined Kristin R. did not carry her burden to demonstrate that return of Z.R. to her custody would promote his best interests. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703-1704.)

2. Restriction of Kristin R.'s Visitation With Z.R. Was Not an Abuse of Discretion

In making visitation orders the juvenile court is vested with broad discretion. The appropriate test for abuse of discretion is whether the court "exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Britain* (1988) 44 Cal.3d 474, 478-479.)

The record in this case, as we have set forth, contains evidence of growing friction and a breakdown in the relationship between Kristin R. and Estella C. There is also evidence that the quality of Kristin R.'s visits with Z.R. recently deteriorated. The record further discloses that the juvenile court was concerned, based on Kristin R.'s recent

behavior and her demeanor at the hearing,⁸ that Kristin R. may be insufficiently stable emotionally to have appropriate unmonitored visits with Z.R. On this basis the court determined that unmonitored visitation should be deferred until Kristin R. can demonstrate greater stability. In deciding the scope of Kristin R.'s visitation based in part on Kristin R.'s behavior and demeanor at the hearing, the juvenile court was making a "quintessentially discretionary determination. The juvenile court's opportunity to observe the witnesses and generally get 'the feel of the case' warrants a high degree of appellate court deference." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) The record thus supports the juvenile court's exercise of discretion to limit Kristin R.'s visitation with Z.R.

3. The Juvenile Court Properly Set a Hearing on The Guardians' Section 388 Petition

In their section 388 petition the legal guardians requested that the juvenile court terminate Kristin R.'s parental rights and select adoption as the permanent plan for Z.R. These orders are properly made at a hearing pursuant to section 366.26, and the juvenile court was required to set such a hearing if the guardians' petition made a prima facie showing of a change of circumstances and "that the best interests of [Z.R.] may be promoted by the proposed change of order." (§ 388, subd. (d); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) A "prima facie" showing refers to those facts that will sustain a favorable decision if the evidence submitted in support of the allegations is credited. (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.) A petition under section 388 must be liberally construed in favor of its sufficiency (Cal. Rules of Court, rule 5.570 (a)), hence if the section 388 petition presents any evidence that a hearing would promote the child's best interest, the court must order the hearing. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

In their section 388 petition the legal guardians alleged that during the period of over five years from the date Z.R. was placed with them, the guardians had nurtured Z.R.,

⁸ The court characterized Kristin R. as being "angry."

cared for all of his needs, raised him as their own child, and shared his achievement of all major developmental milestones. Z.R. and the guardians had formed a strong emotional bond and shared a loving family relationship. These factual allegations are sufficient to make a prima facie showing of a change of circumstances and that the proposed change of order will promote Z.R.'s best interests.⁹ The court thus properly set a hearing pursuant to section 366.26 to determine whether the legal guardians' section 388 petition should be granted.

DISPOSITION

The petition is denied on the merits. The stay issued June 1, 2009 is vacated.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

⁹ The record shows that the juvenile court's decision to set a hearing pursuant to section 366.26 was based on its determination that the legal guardians' section 388 petition made a prima facie case. The court did not indicate an inclination to make the change of order requested by the legal guardians. The court expressly stated, "[W]e're nowhere near any termination of parental rights," and told the legal guardians, "[The section 366.26] hearing will be your Mount Everest."